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IN THE

Supreme Court of the United States

Beverly S. Malone, PETITIONER

v.

American Equity Investment Life Insurance Co. and Charles W. Strube, individually and as Trustee of the Charles W. Strube Revocable Trust, on behalf of himself and all others similarly situated.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can an appellate court consistent with due process change the terms of a class action settlement agreement when that change is contrary to the findings of the district judge who approved it, especially where this new agreement now prevents the petitioners-objectors from pursuing claims against the respondent in state court founded on facts beyond those settled in these proceedings?

2. Has the court of appeals' decision to impose upon the parties at the appellate level an entirely new class action settlement agreement to which they never assented usurped the duty of inferior federal courts under Fed. R. Civ. P. 23(e) to approve settlements of class actions only when they are "fair, reasonable, and adequate" as well as the purpose of the Class Action Fairness Act to avoid unjustified awards to certain plaintiffs at the expense of other class members?

3. Has the petitioner-objector been denied fundamental fairness when her right to bring claims against the respondent in Kentucky on factual predicates entirely different than those assumed in these proceedings has been extinguished by the court of appeals' decision?

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The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit in *Charles W. Strube, et al. and Beverly Malone v. Amercian Equity Investment Life Insurance Company*, (C.A. No. 05-11461-GG), decided November 29, 2005, reversing the District Court's refusal to enjoin the petitioner from pursuing her claims against the respondent in the state courts of Kentucky on claims founded on facts beyond those settled in these proceedings, is set forth in the Appendix hereto(App. 1-6).

The unpublished Opinion of the United States District Court for the Middle District of Florida, Orlando Division, in *Charles W. Strube v. Amercian Equity Investment Life Insurance Company*(Docket No. 6:01-cv-1236-Orl-19-DAB), decided February 8, 2005, approving of the parties' Amended Stipulation of Settlement, is set forth in the Appendix hereto(App. 7-42)

The unpublished order of the United States Court of Appeals for the Eleventh Circuit in *Charles W. Strube, et al. and Beverly Malone v. Amercian Equity Investment Life Insurance Company*, (C.A. No. 05-11461-GG), decided April 6, 2006, denying the petitioner's timely filed petition for panel rehearing or, alternatively, for rehearing *en banc*, is set forth in the Appendix hereto(App. 43-44).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit reversing the District

Court's refusal to enjoin the petitioner from pursuing her claims against the respondent in the state courts of Kentucky on claims founded on facts beyond those settled in these proceedings, is dated November 29, 2005; and its order denying the petitioner's timely filed petition for panel rehearing or, alternatively, for rehearing *en banc* was filed and decided on April 6, 2006(App.1;43).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for panel rehearing or, alternatively, for rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

This matter involves a district court's approval of a class action settlement and release affecting tens of thousands of elderly Americans who were victims of a scam involving worthless "living trusts." In the Spring of 2001, the petitioner Beverly Malone ("the petitioner") commenced litigation in Kentucky against nine individuals and entities, including the respondent American Equity Investment Life Insurance Company ("the respondent" or "American Equity"), arising out of an intricate scheme to market living trusts to the elderly. Malone is the class representative for all persons in the United States who fell prey to that scam,

which involved salesmen who first would act as agents of a local attorney to sell living trusts to the elderly and then transmute into insurance agents for the respondent in order to churn their accounts and drain their assets.

The primary participants in the scheme described by the petitioner in her Kentucky state court action are the defendants Michael McIntyre ("McIntyre") and his various companies, as well as the respondent American Equity. The conduct at issue in the *Malone* Kentucky suit focuses on the relationship between American Equity and the various companies McIntyre has created over the years in furtherance of the living trust scam. The entities at issue—ALMS/Advanced Legal Systems ("ALS") and Addison Insurance Marketing ("AIM")—are referred to by McIntyre as "The Addison Group." AIM, the McIntyre entity that masquerades as the "annuity" business, is the general partner of ALS, the entity that holds itself out as the "living trust" business. Michael McIntyre owns 100% of AIM and a 99% limited partnership interest in ALS. The remaining 1% general partnership interest in ALS is owned by AIM.

American Equity considered acquiring an interest in McIntyre's trust mill operation. It ultimately chose not to purchase the scam and instead chose merely to fund it. American Equity agreed to pay McIntyre $40,000-$80,000 per month to keep the scam machinery running. For his part, McIntyre agreed that his minions would sell *only* American Equity annuities.

As with most scams, the living trust scam was simple:

— American Equity provided funds to McIntyre to be used for direct mail Slicitations ostensibly sent by local attorneys associated with ALS, McIntyre's "living trust" company. These solicitations specifically targeted the elderly and informed them of their "legal right as an American to establish a living trust;"

— These direct mail solicitations provided the name of a local attorney and a reply card to receive more information. It also listed a telephone number for the attorney. However, the phone number was *not* the numver for the attorney but rather for a phone at AIM, McIntyre's "annuity" company in Dallas, Texas;

---- When a victim responded to the solicitation, an ALS "customer service representative" (CSR) purporting to represent that local attorney would be dispatched by operators in Dallas to the victim's home. The CSR would attempt to sell the victim a living trust and in the process would gather information about the victim's assets;

---- When the victim purchased a living trust, the CSR would provide data to the attorney who would use a program provided by McIntyre to plug victim-specific information into a boilerplate living trust instrument;

---- An AIM "delivery agent" would deliver the living trust to the victim for signing and would obtain the "fee" for the trust. The victim would pay $1,995.00 *or more* for the often worthless living trust. However, the attorney would keep only $250; the remainder was sent to McIntyre. The CSR would receive $600 for the sale of the trust and the delivery agent would

receive $40 for delivering it to the victim;

---- The delivery agent was always a licensed insurance salesman and had to first work with ALS to "learn" the living trust scam.

When delivering the documents, the agent would inform the victim that the living trust had to be "funded" and would convince the victim to exchange various assets for annuities. *The delivery agent would not disclose that he was now acting as the agent for the respondent American Equity, the company whose annuities he was selling.* Instead, the victim continued to believe that he was still acting on behalf of the attorney who had "prepared" the trust; and

---- returning full circle, the respondent American Equity would then sell its annuities to the victims, more than recovering from these victims of the scam the monies it provided McIntyre to market these living trusts.

The trust scam "business model" was extremely lucrative to everyone involved—except, of course, the victims. American Equity sold almost One **Billion** Dollars ($1,000,000,000) of equity indexed annuities through the living trust scam during the period covered by the *Malone* class alone. Similarly, McIntyre's 1997 compensation from The Addison Group was almost $2,000,000.

Malone's class action in Kentucky state court predictably has been marked by the efforts of the defendants there, including the respondent, to postpone a trial for as long as possible by repeatedly stalling legitimate discovery requests by Malone and three times seeking to remove the matter to federal court,

efforts which the federal district court has consistently rejected.

In the meantime, on September 28, 2001, Charles W. Strube ("Strube"), then 75 years of age, on behalf of himself and a nationwide class of 23,000 individuals, brought this class action in the state courts of Florida against the respondent American Equity alleging that it had committed a variety of misrepresentations and omissions in connection with its sale to class members of equity-indexed annuities for estate planning purposes. The gravamen of his complaint, thrice amended, was that the respondent had engaged in a wrongful scheme to develop, market, advertise, and sell certain annuities called "equity indexed annuities" through a centrally organized strategy, targeting with its sales persons senior citizens as potentially vulnerable buyers.

According to Strube's allegations, the respondent's agents do not have to be registered, licensed or otherwise regulated to sell these annuities and its standardized strategy in marketing is to have an agent meet with an elderly customer, establish a relationship of trust and confidence, and then give an incomplete and misleading description about the product. As Strube alleged, the actionable fraud here, the gist of his complaint, is bottomed on the respondent's *dis*information and confusion it created in the sale of its annuities:

> the [respondent] does not adequately screen new sales agents or train its agents about the details of the product even though it knows the product is complex....Since the agents are merely

> conduits of information, they are unable to dispense an appropriate level of information about the product to the customers, so the customers cannot be sufficiently informed about what they are purchasing. (App. 11)

The respondent offers high commissions which are not disclosed; and by financially encouraging a high sales quota, it fosters the use of high pressure and deceptive sales practices, creating an environment where agents are encouraged to do whatever it takes to make a sale. (*Id.*) Finally, by the use of standardized forms and other documentation, the elderly customers are walled off from the disclosure of important information which they deserve by law to know in order to see this investment vehicle for the sham financial opportunity that it is(App. 11-13).There are no factual allegations or claims in the *Strube* relating to the living trust scam litigation described by Malone's allegations in her Kentucky class action.

Because of diversity of citizenship, Strube's class action was removed to the federal district court for the Middle District of Florida. Counsel for the *Strube* litigants, John R. Hargrove, Esq., a local attorney, then colluded with the respondent American Equity and negotiated a settlement before a class had even been certified. Even though the settlement provided an extravagant fee for Hargrove and just coupons for members of the class, the district judge granted preliminary approval to the settlement on May 20, 2004, and thereafter notice was sent by American Equity to 23,000 purchasers of its "equity indexed annuities." Malone is a member of the class identified in Strube's class settlement agreement.

The proposed settlement agreement, drafted by American Equity with Hargrove's collusion, provided that all of the class members would release the respondent *and its agents* from any and all claims that "have been, could have been, may be or could be alleged or asserted now or in the future by [Strube] or any Class Member...on the basis of, connected with, arising out of, or related to, in whole or in part, the Released Transactions"(App. 2-3;19).The settlement agreement defines "Released Transactions" as "the marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation, performance, retention, administration, and/or replacement...of [equity annexed annuities issued by the respondent during the Class Period]"(App. 2-3;19).

Malone filed written objections to the proposed settlement agreement. She argued that the proposed settlement agreement was overbroad, would release the respondent from responsibility for its egregious fraud in Kentucky in selling *the living trust investment vehicle* which is not encompassed by Strube's litigation and would result in releasing all of the defendants in her state court class action in Kentucky from liability, an event which would leave her with no remedy at all for the "living trust mill" and the egregious fraud which the respondent together with the companies owned by Michael McIntyre perpetrated upon the elderly in the United States. As Malone contended, Strube's allegations encompassed by the settlement agreement do

> not include allegations directly related *to the use of living trusts as a tool for selling annuities*, and therefore the proposed

> settlement does not contemplate these claims and insufficiently compensates class members in her particular position. Finally, ...the court's approval of the settlement would permit McIntyre and his associates, previously admonished by the Federal Trade Commission and various forums in several states [i.e., New Jersey, Ohio, Kansas, Pennsylvania and Oregon] for his operation of trust mills, to continue such operation without recourse.

(App. 32;41)(emphasis supplied).

At the hearing on the settlement agreement in district court, lead counsel for the respondent American Equity, Charles F. Smith, Esq., agreed with Malone by stating to the district court:

> There are defendants in the *Malone* case, including the attorneys and including some of the McIntyre-related entities that are not our agents and are not released by this release. So, the *Malone* case can continue against those entities as a putative class action. What it cannot do is continue against us, *based on the sale of annuities*, because that is what is released here.

(emphasis supplied).

Based partly on this statement by the respondent's counsel in open court that the scope of the release did not encompass the respondent's marketing of living trusts in Kentucky, the district judge, Fawsett, J., on February 8, 2005, agreed with Malone's objections(App. 32-35). In her 35-page decision

approving the settlement agreement in broad form, the district court nonetheless concluded that

> the alleged conduct at the heart of [Strube's] complaint...consists of a nationwide, company-wide scheme of preying on elderly customers through inadequately trained agents who deceptively induced them to purchase equity indexed annuities. [The respondent American Equity through its counsel] has represented that the release would serve to bar only those claims relating directly to the marketing and sale of such annuities.

(App. 34).

Even though some of Malone's class members are some of Strube's class, Judge Fawsett ruled that "nothing in the settlement agreement should be interpreted to preclude any claim made by Malone or another class member similarly situated with regard to the marketing, preparation or sale of living trusts"(App. 34). With that qualification, the district judge found the release and waiver provision appropriate(App. 34-35).

On March 3, 2005, Malone timely noticed her appeal from this ruling by the district judge. In spite of this, one week later, on March 10, 2005, the respondent filed a motion *in district court* asking Judge Fawsett to enjoin Malone from continuing to litigate her putative class action in Kentucky state courts founded on the respondent's fraudulent acts and practices in the marketing of living trusts to the elderly there.

On May 9, 2005, Malone filed her Main Brief in the court of appeals for the Eleventh Circuit, arguing that the release was impermissibly overbroad; that Strube's claims are not based upon the same factual predicates as the claims in Malone's Kentucky action; that Strube was not an adequate class representative for any of Malone's class; that Strube's claims were not typical of Malone's putative class; and that if the release here absolves the respondent American Equity of its participation with McIntyre and his Addison Group companies in the egregious fraud perpetrated upon the elderly in Kentucky through the marketing of living trusts, then the district court must evaluate whether the settlement agreement is fair, adequate and reasonable.

Ten days later, on May 19, 2005, Judge Fawsett held a hearing on the respondent's motion. In the face of the argument by the respondent that Malone should not be allowed to pursue her putative class action in Kentucky founded upon the respondent's fraudulent marketing of living trusts to the elderly in collaboration with McIntyre and his Addison Group companies, the district judge clearly stated that she did not understand that to be the effect of her prior order; that she knew that the effect of her order was otherwise; and that she did not intend to release the respondent from the effects of unlitigated conduct such as the fraud connected to the marketing of the living trusts in Kentucky.

In the course of this hearing, Judge Fawsett unequivocally stated to respondent's counsel--- who now attempted to change the terms of the agreement to include Malone's living trust allegations in Kentucky----

> [that] is not what I understood the settlement to be about when the argument was made and when the attorneys came from Kentucky...to argue to me....
>
> And I tried very hard in my order to exclude the living trust issue, because that is what Ms. Malone's attorney came down and argued to me. And that was a point at which you and Mr. Hargrove should have said to me...judge, if you're going to exclude these living trusts, then we don't have a settlement. *You did not do that.*

(Emphasis supplied).

In fact, counsel for the respondent American Equity and Strube as well were forced to admit upon direct questioning by Judge Fawsett that Malone's living trust claims were **not** based upon the same factual predicates as the claims in Strube's class action:

> THE COURT: [T]here's nothing that I can see, and I want to be sure that I'm right on that, in either of [the *Strube* class representatives'] claims, that related to living trusts as part of the misrepresentation in a sale; is that correct, Mr. Hargorove?
> MR. HARGROVE: *That is correct.*
> MR. SMITH: *That is correct*, Your Honor. I agree with Mr. Hargrove on that as well.

(Emphasis supplied).

As the respondent's counsel succinctly conceded, "[t]he allegations in the *Malone* case are that the living

trust was created to get assets that then could be used to purchase American Equity annuities" and that Strube's trust was *not* this kind of scheme. The district judge agreed: "I never intended to eliminate all the other types of fraud [with the settlement agreement]....There is only one type of alleged fraud that was presented to me and that was...direct sales of these equity-indexed annuities."

The district judge thereupon denied the respondent's motion seeking to enjoin Malone from continuing to litigate against it in Kentucky her claims founded upon its marketing of living trusts. The respondent noticed its appeal and on June 10, 2005, the court of appeals granted the respondent's motion to consolidate the parties' appeals.

On November 29, 2005, without oral argument, the court of appeals in a *per curiam* opinion reversed the district court's refusal to grant the respondent an injunction preventing Malone from prosecuting her putative class action in the Kentucky state courts(App. 1-6). It ruled that the plain language of the settlement agreement forbids Malone from pursuing her class action in Kentucky "for claims arising out of their creation of a living trust for her;" and it inexplicably concluded that both Malone and the respondent recognize this fact(App. 4). It therefore thought that the district judge's interpretation of her own ruling to the contrary, i.e., that the settlement agreement did *not* release claims connected with living trusts, was wrong on its face (App. 4).

Having reached a conclusion about this class action settlement agreement at odds with the

expressed intention of the district judge and the statements of all counsel for the parties below, the court of appeals nonetheless ruled that Malone is now bound by its reinterpretation without giving her the opportunity to opt out of the Strube class. It thereupon concluded as a matter of law that both the Kentucky litigation and the *Strube* action concern the respondent's marketing and sale of equity-indexed annuities; and that Malone was now enjoined from continuing with her living trust suit against the respondent in Kentucky(App. 6).

On April 6, 2006, the Court of Appeals denied the petitioner's timely filed petition for panel rehearing or, alternatively, for rehearing *en banc*(App. 43-44).

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Formulation Of A New Class Action Settlement Agreement----An Agreement At Odds With The One Approved By District Judge And The One Understood And Acquiesced In By All Counsel---- Is Unauthorized By The Decisions Of This Court And Denies The Petitioner Due Process Of Law By Unfairly Preventing Her From Seeking Relief In State Court From The Respondent On Facts Beyond Those Settled In These Proceedings.

According to the provisions of former Fed. R. Civ. P. 23(e), no class action could be dismissed or compromised "without the approval of the court." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617;620-621(1997). *Evans v. Jeff D.*, 475 U.S. 717, 724-725;726; 738-739(1986). In 2003, subdivision (e) of Rule

23 was amended to "strengthen the process of reviewing proposed class-action settlements." Advisory Committee Notes to the 2003 Amendments to Subdivision (e) of Rule 23. While settlement was viewed as a desirable means of resolving a class action, "court review and approval *are essential* to assure adequate representation of class members who have not participated in shaping the settlement." *Id.*(emphasis supplied).

In order to protect the interests of those class members who have not participated in shaping the precise terms of the settlement agreement, Rule 23(e)(1)(A) now provides that the district court "must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class;" and under subsection (1)(C), the district judge may approve such a settlement, dismissal or compromise that would bind class members but "only after a hearing and on finding that the settlement, voluntary dismissal, or compromise, is fair, reasonable, and adequate." What is fair, reasonable and adequate turns on the particular circumstances of a given controversy. However, as the Advisory Committee Notes to the 2003 Amendments make clear, "the court *must* make findings that support [its] conclusion that the settlement is fair, reasonable and adequate...[and they must be set out] in sufficient detail to explain to class members and the appellate court the factors that bear on applying that standard." *Id.*(emphasis supplied).

Long before Rule 23 was amended in 2003 to provide more explicitly for this oversight by the district judge over the fairness, reasonableness and adequacy of any settlement agreement arising during the course

of a class action, this Court in *Evans v. Jeff D.*, 475 U.S. at 726-727, identified the parameters of the district judge's power in the process of approving such agreements. In ruling that the district judge had the authority to waive an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 incident to the settlement of the class action there, the *Evans* Court noted that the district court's authority to pass on such agreements is justified by the need to insure fair treatment for *all* class members. *Id.* at 739. However, beyond this preeminent duty, the district judge cannot require the parties to accept a settlement to which they have not assented. *Id.* at 726.

Thus even though the district judge could have advised the parties here that it would not approve their proposed settlement unless some of its provisions were deleted or modified, "Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection." *Id.* at 727. The *Evans* Court described the choices available to the district judge in these circumstances: accept the proposed settlement; reject the proposed settlement and postpone trial to see if the parties can reach a further accommodation; or try the case. *Id.*

Following these principles enunciated in *Evans* as well as those requirements identified in the recently amended Rule 23(e)(1)(C), Judge Fawsett did not require any of the parties to accept provisions in the settlement agreement to which it did not agree. Instead, she held a hearing and then made findings that the proposed settlement agreement which released not only the respondent but also all of its agents from any

and all claims that "have been, could have been, may be or could be alleged or asserted now or in the future by [Strube] or any Class Member...on the basis of, connected with, arising out of, or related to, in whole or in part, the Released Transactions [which include]...the marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation, performance, retention, administration, and/or replacement...of [equity annexed annuities issued by the respondent during the Class Period]," treated all of the *Strube* class members fairly and was otherwise fair, reasonable and adequate(App.15-35).

An integral part of its conclusion that the settlement was fair to all members of the class was the district court's determination that it did not release Malone's claims in Kentucky(App. 30-35). The district judge made two crucial findings to support this ruling. First, she found that the *Strube* allegations, i.e., that the respondent engaged in a nationwide marketing and sales program whereby customers were fraudulently or negligently misled as to the benefits of purchasing its equity indexed annuities through the use of standardized forms and inadequately trained agents using uniform sales pitches, did *not* encompass the factual predicates of Malone's Kentucky suit that the respondent collaborated with licensed attorneys as well as McIntyre's companies in a sophisticated scheme to sell living trusts to the elderly and then use this device to convert all of the victims' remaining assets to investment vehicles, the respondent's annuities among them(App. 21;30-35). Second, Judge Fawsett justifiably relied upon the serial admissions by the respondent's lead counsel below "that the release would serve to bar only those claims *relating directly* to the marketing and

sale of such annuities," *not* living trusts(App. 34) (emphasis supplied).

The district court's refusal to include Malone's Kentucky suit within the ambit of Strube's settlement agreement was correct as a matter of law. In the first place, while it is not uncommon for a class action settlement to contain a global release of all claims, past, present, and future, that the parties might have brought against each other even though they are not before the court, *Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274(7th Cir. 1998); *In re Prudential Ins. Co. of America Sales Litigation*, 148 F.3d 283, 326 & n.82; *Association for Disabled Americans v. Amoco Oil*, 211 F.R.D. 457, 471(S.D. Fla. 2002), those claims must be based upon the identical factual predicates which underlie the claims in the settled class action suit. *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 376-377 quoting *TBK Partners, Ltd. v. Western Union Corp.*, 675 F. 2d 456, 460(2nd Cir. 1982). As the court noted in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563(3rd Cir.), *cert. denied*, 513 U.S. 986(1994), requiring the identical factual predicate before including a claim within a settlement agreement "prevents relitigation of settled questions at the *core* of a class action." *Id.* quoting *TBK Partners, Ltd. v. Western Union Corp.*, *supra*(emphasis supplied). *Accord, Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. at 377-378.

The core or gravamen of Strube's class action in Florida describes respondent's nationwide marketing and sales program where customers were fraudulently or negligently misled as to the benefits of purchasing

its annuities through the use of standardized forms and inadequately trained agents using uniform sales pitches. The heart of the fraud/negligence alleged by Strube is the blunt instrument of disinformation which highly motivated but uninformed sales agents dispense to elderly customers in the *direct* marketing of the respondent's annuities.

That conduct is dramatically different in kind and degree from Malone's allegations in Kentucky that in collaboration with McIntyre and his companies which ran a "living trust mill" and using the ruse of a local attorney peddling estate planning products, the respondent funded a sophisticated scheme to sell living trusts to the elderly and then used this living trust device in order to convert all of the victims' remaining assets to investment vehicles, the respondent's annuities among them. It was a deft, complicated scheme, containing many parts and many actors; it was designed not to market the respondent's annuities directly to the elderly as in *Strube* with heavy handed sales techniques but rather to insinuate the agents of the respondent and McIntyre into the households of the elderly using the trusted figure of a local attorney who offered them a living trust as a viable estate planning tool, and then using that device, sold them the respondent's inappropriate investment products, annuities among them.

In *National Super Spuds v. N.Y. Mercantile Exchange*, 660 F.2d 9, 16-18(2nd Cir. 1981), Judge Friendly identified the appropriate analysis when deciding whether a claim is subsumed within and thus released by a class action settlement agreement. *Id.* at 18 & n. 7. There a holder of an unliquidated position on

potato futures sought to object to the settlement by the class representative who held a *liquidated* long position in those futures because the settlement released unliquidated claims as well. *Id.* at 16-17. In declining to permit the uncompensated release of claims resting on a separate factual predicate from that settled in the class action, Judge Friendly stated:

> [w]e assume that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint *but depending upon the very same set of facts*. This is not such a case. The settlement before us would bar [the objector] and others similarly situated from asserting claims, distinct from those represented by the class action plaintiffs, which depend not only upon a different legal theory *but upon proof of further facts*, namely the holding of unliquidated contracts after May 7, wrongful default on those contracts, and the damages caused by the default.

Id. at 18 n.7(emphasis supplied).

Stated differently, the named plaintiff in a class action such as Strube "cannot represent a class of whom [he is] not a part," *Bailey v. Patterson*, 369 U.S. 31, 32-33(1962)(*per curiam*), and he can only represent a class of whom he is a part but only to the extent of the interests he possesses in common with members of the class. *Id.* Strube cannot stand in for Malone's class claims because those claims require, as in *National Super Spuds*, proof of further facts, namely the

wrongful marketing of living trusts in collaboration with McIntyre, the use of a trusted local attorney, the insinuation of their agents into the households of the elderly to suggest the "funding" of the living trust with the respondent's inappropriate investment products, annuities among them. None of these facts germane to Malone's class—none of this onerous and actionable conduct--- is implicated by Strube's allegations describing the respondent's barely fraudulent or even negligent direct selling strategy by an uninformed but highly motivated sales force. As Judge Friendly remarked in *National Super Spuds*, "[i]f a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." 660 F.2d at 18.

In the second place, Judge Fawsett in defining the scope of the release was right to rely upon the serial admissions of the respondent's lead counsel, Charles F. Smith, Esq., as well as Strube's counsel below that the *Strube* agreement and its release addressed only the respondent's direct sale of annuities to the elderly and *not* its sale of living trusts, however defined(App. 34). See *National Super Spuds*, 660 F.2d at 17. *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503, 512-513 (E.D.N.Y. 2003). *Association for Disabled Americans v. Amoco Oil*, 211 F.R.D. at 472 & n.11 and cases cited.

Instead of acknowledging the district court's duty under Rule 23(e)(1)(C) to insure that the settlement agreement was fair, reasonable and adequate, identifying with precision the dimensions of the release so that Malone's claims in Kentucky were

not precluded by the different predicate facts in *Strube*, the court of appeals concluded that the "plain language of the settlement forbids Malone from maintaining her action against American Equity in Kentucky for claims arising out of their [sic] creation of a living trust for her"(App. 4). It elevated its own interpretation of the agreement over the informed decision of the district court as well as the statements of the parties' own counsel below who colluded in drafting it, concluding that "[b]oth the Kentucky litigation and the *Strube* action concern American Equity's marketing and sale of equity-indexed annuities"(App. 5).

In this process, the court of appeals formulated an entirely new class action settlement agreement in this case, one at odds with the one approved by Judge Fawsett in performing her duties under Rule 23(e)(1)(C); one unauthorized by the relevant law of this Court including *Matsushita*, *Amchem* and *Evans*; one completely undercut by Judge Friendly's legal analysis in *National Super Spuds*; and one belied by the statements of respondent's lead counsel that the settlement agreement operates to release claims stemming only from the respondent's direct sale of annuities to the elderly, *not* its marketing or sale of living trusts.

Moreover, this new reading of the settlement agreement by the court of appeals denies the petitioner due process of law by unfairly preventing her from seeking redress from the respondent in the Kentucky state courts on predicate facts beyond those settled in these proceedings. This Court has held that where an appellate court interprets positive law in a way that was unforeseen, "unexpected," or "indefensible by

reference to the law which had been expressed prior to the conduct in issue," in order to deny a litigant such as Malone an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights. See, e.g., *Bush v. Gore*, 531 U.S. 98, 115 (2000)(Rehnquist, C.J., concurring)(State court's interpretation of its own election laws impermissibly distorted them beyond what a fair reading required); *Wright v. Georgia*, 373 U.S. 284, 289-291(1963)(breach of peace statute newly construed; violation of due process); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458(1958)(state court's unexpected resort to new procedural rules at odds with prior practice to deny relief to alleged contemnors is a violation of due process). Such is the case here. The court of appeals' ruling has deprived the petitioner of her right to seek redress from the respondent in the Kentucky state courts on predicate facts beyond those settled in these proceedings. Its unprincipled decision has permitted what the district judge's assiduous attention to her duties under Rule 23(e) had prevented, i.e., the respondent's hijacking of the settlement process to further its own ends and foreclose the petitioner from pursuing her discrete claims in Kentucky.

In addition, the court of appeals' new interpretation of the settlement agreement, one which undercuts the district judge's preeminent role under Rule 23(e)(1)(C), of insuring that the settlement agreement is fair, reasonable and adequate, amounts to such an intervening change in the law that it invokes this Court's equitable power to modify the court of appeals' ruling so that the ruling does not become "an instrument of wrong." *Railway Employees v. Wright*, 364 U.S. 642, 651(1961). See *Evans*, 475 U. S. at 726;

Pasadena City Board of Education v. Spangler, 427 U.S. 424, 437-438(1976); *Whitcomb v. Chavis*, 403 U.S. 124, 162-163(1971).

The ultimate standard for applying collateral estoppel or res judicata in order to bar a litigant from prosecuting a claim thought to be covered by an earlier release is fairness and equity in all the circumstances. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 329, 331(1979). *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 334(1971). For all the reasons identified herein, the petitioner has been denied fairness and equity as well as due process in seeking to prosecute her claims against the respondent in Kentucky in the wake of the judgment below.

2. As A Matter Of Due Process And In Order to Promote The Purposes of Fed. R. Civ. P. 23(e) As Well As The Class Action Fairness Act (CAFA), This Court Should Rule That When An Appellate Court Recasts The Parties' Class Action Settlement Agreement, It Must Also Remand The Matter To The District Court In Order To Provide The Affected Parties With An Opportunity To Revise The Settlement Agreement Or To "Opt Out" As Members Of This Presumptive Rule 23(b)(3) Class.

Running through Rule 23(e)'s language requiring judicial oversight of any class action settlement agreement is an understandable concern that one class representative not sharing common interests with other class members would "endeavor[ ] to obtain a better settlement by sacrificing the claims of others at no cost to" himself by throwing the others'

claims "to the winds." *National Super Spuds*, 660 F.2d at 17 n.6; 19 n.10. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F. 2d at 462. Thus where, as here, the class representative (Strube) does not share all the claims of another member of the class such as Malone, there is no guarantee that Strube will fully advance the unshared claims of Malone; there is no assurance that he will not "sell out" Malone's claims in settling his own claims with the respondent. *Id.*

In fact, this is exactly what Strube did. In return for an extravagant fee (received from American Equity), Strube's counsel below colluded with American Equity to sell out Malone and other members of the class in order to draft an ambiguous settlement agreement whose terms American Equity could argue now preclude Malone's much more financially dangerous suit in Kentucky. After all, American Equity sold almost One **Billion** Dollars ($1,000,000,000) of equity indexed annuities through the living trust scam during the period covered by the *Malone* class alone. Its exposure in Malone's national class action in Kentucky could be formidable; and its attempt to hijack that litigation in the guise of a settlement agreement in *Strube* is a blatant abuse of the class action proceedings identified in Rule 23(e).

This same concern is expressed as well in the preamble to the Class Action Fairness Act ("CAFA"), enacted on February 18, 2005. Section 2 (a)(3)(B) of Public Law No. 109-2 provides in "Findings and Purposes" that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed such as where...Counsel are awarded large fees, while leaving class members with coupons or other

awards of little or no value [and] unjustified awards are made to certain plaintiffs at the expense of other class members...."

Because of the court of appeals' inexplicable and unfair rereading of the settlement agreement, this is precisely the result reached here. Contrary to the self-evident, salutary purposes of Rule 23(e) and CAFA, Malone's legitimate claims, resting on separate factual predicates, against the respondent stemming from its fraudulent living trust scheme with McIntyre in Kentucky, have been "thrown to the winds" by Strube and his counsel without compensation in order to facilitate the settlement of Strube's own claims against the respondent in Florida for common marketing misbehavior while providing his attorney with a sizable fee award. It is an unfair result and it undermines the purposes of both Rule 23(e) and CAFA.

It also denies the petitioner due process. Her claim against the respondent in Kentucky is a valuable property right entitled to due process protection. *Los Angeles v. David*, 538 U.S. 715, 717(2003). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541(1985). The process due her below consists of the opportunity to complete discovery in Kentucky on her allegations and obtain a full trial on the merits where her proof will be tested before an impartial tribunal/fact finder. See *Hamdi v. Rumsfeld*, 542 U.S. 507,533 (2004) quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62(1972); *Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970).

In order to provide the petitioner with due process and in view of the fact that Strube's class was presumptively proper for certification by the lower

court under Rule 23(b)(3), this Court should rule that when an appellate court recasts a class action settlement agreement to mean something other than what the district court and the parties intended, it must also remand the matter to the district court in order to provide the affected parties with an opportunity either to revise the settlement agreement or to "opt out" as members of this presumptive Rule 23(b)(3) class. See *Matsushita*, 516 U.S. at 395; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812(1985); *Hansberry v. Lee*, 311 U.S. 32, 41-44(1940).

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit and, ultimately, to vacate that judgment and remand the matter to the district court for the Middle District of Florida with instructions that it reinstate its refusal to enjoin the petitioner-objector from pursuing her claims against the respondent in the state courts of Kentucky on claims founded on facts beyond those settled in these proceedings; or order that Malone be given the opportunity in the district court to revise the settlement agreement or to opt out as a member of the presumptive Rule 23(b)(3) class in *Strube*; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,
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(footnotes trail end of document)

No. 05-11461 Non-Argument Calendar, No. 05-13014 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES W. STRUBE, individually, and as Trustee of the Charles W. Strube Revocable Trust, on behalf of himself and all others similarly situated, WILBERT NORRIS, individually and on behalf of himself and all others similarly situated, et al.,
Plaintiffs-Appellees,

BEVERLY MALONE,
Plaintiff-Appellant,

versus

AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY, an Iowa corporation,
Defendant-Appellee.

November 29, 2005, Decided

November 29, 2005, Filed

NOTICE: NOT FOR PUBLICATION

JUDGES: Before ANDERSON, BLACK and PRYOR, Circuit Judges.

OPINION: PER CURIAM:

This consolidated case concerns two appeals pertaining to the settlement of a class action. Charles Strube, on his own behalf and on behalf of a nationwide class of 23,000 individuals, sued American Equity Investment Life Insurance Company ("American Equity"), alleging that American Equity committed a variety of misrepresentations and omissions in connection with its sale to class members of equity-indexed annuities for estate planning purposes. Beverly S. Malone, a member of the class, challenges the settlement to the extent that it would force her to abandon her personal claims against American Equity in a Kentucky state court alleging that American Equity committed various misrepresentations and omissions in connection with their establishment of Malone's living trust. American Equity appeals the denial of an injunction it sought preventing Malone from continuing with her personal action. Strube reminds this Court that the ages of the class members make time of the essence in the disposition of this case.

On September 28, 2001, Charles Strube filed a class action in Florida state court which was later removed to the United States District Court for the Middle District of Florida on October 22, 2001. On February 8, 2005, the district court entered an order granting final approval of the class settlement agreement. The settlement provided for various forms of non-economic and economic relief and required class members to waive their rights to maintain claims against American Equity "on the basis of, connected with, arising out of, or related to, in whole or in part" "the marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation , performance, retention, administration and/or replacement" of covered equity

indexed annuities. The district court interpreted the release not to apply claims similarly situated to the marketing, preparation, or sale of living trusts. On May 19, 2005, American Equity sought an order from the district court enjoining Malone from continuing with her action against American Equity in Kentucky. The district court declined to do so because it believed an evidentiary hearing would be needed to determine whether Malone's living trust claims were in fact claims about equity indexed annuities. On May 25, 2005, American Equity appealed the denial.

I. Jurisdiction of American Equity's Appeal.

On June 9, 2005, this Court certified the following jurisdictional question for the litigants: "Whether the district court's May 19, 2005 order denying [defendant's] motion for . . . an injunction is immediately appealable?" We conclude that this Court has jurisdiction.

II. Does the Settlement Agreement Quash Malone's Kentucky Suit?

This Court reviews the interpretation of a class action settlement agreement *de novo*. *See, e.g.*, Waters v. Int'l Precious Metals Corp., 237 F.3d 1273, 1277 (11th Cir. 2001) ("We review the district court's construction of the [settlement] agreement de novo."). Under Rule 23(e) of the Federal Rules of Civil Procedure, court approval is required for the settlement of the claims of a certified class. Courts do not have the power to modify the terms of the settlement that has already received the agreement of the parties. Evans v. Jeff D., 475 U.S. 717, 726, 106 S.Ct. 1531, 1537, 89 L. Ed. 2d 747

(1986) ("the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed.")

Both Malone and American Equity recognize that the plain language of the settlement forbids Malone from maintaining her action against American Equity in Kentucky for claims arising out of their creation of a living trust for her. Malone's trust was funded by her purchase of an equity-indexed annuity from American Equity. In her pleadings and statements before the district court, Malone described the living trust as a "Trojan horse" for the sale of equity-indexed annuities. Because the living trust is, "in whole or in part," "connected with" and "related to" the sale of equity-indexed annuities, the terms of the settlement agreement release American Equity from any potential liability concerning Malone's living trust.

Nonetheless, Malone contends that the Kentucky suit remains viable. She claims that the plain language reading of the settlement is trumped by the district court's interpretation of the settlement as not releasing claims connected to living trusts. However, our interpretation of the settlement is determined by its plain language, and not by any interpretive glosses provided by the district court. *See* Waters v. Int'l Precious Metals Corp., 237 F.3d 1273, 1276-77 (11th Cir. 2001).

Alternatively, she then asks this Court to find that the district court wrongly approved the settlement agreement. In deciding whether to approve a settlement agreement, a district court must determine

whether the agreement is "fair, reasonable, and adequate." Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985) (". . . the district court has a heavy duty to ensure that any settlement is 'fair, reasonable, and adequate.'") (internal citations omitted). This Court examines a district court's approval of a class action settlement agreement under the "abuse of discretion" standard. Bennett v. Behring, 737 F.2d 982, 986 (11th Cir. 1984). This inquiry evaluates the fitness of the settlement in its entirety. Cotton v. Hinton, 559 F.2d 1326, 1332 (5th Cir. 1977) ("The settlement must stand or fall as a whole.")

We leave untouched the district court's approval of the settlement agreement. As Malone concedes, her objections to the settlement are not shared by any other of her fellow class members. Her criticisms of the agreement are peripheral to the chief bargains struck between the plaintiff class and American Equity. She asserts that the settlement is impermissibly broad because it would quash her Kentucky litigation which, she argues, involve claims that are based on an entirely different factual predicate. We do not find that to be the case. Both the Kentucky litigation and the *Strube* action concern American Equity's marketing and sale of equity-indexed annuities. In addition, Malone's arguments challenging the adequacy of Strube to serve as lead representative and the typicality of his claims are waived because they were not raised before the district court. *See, e.g.*, Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that 'an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.'") (citations omitted).

Thus, we hold that the terms of the settlement agreement prevent Malone from continuing with her living trust suit against American Equity in Kentucky. Consequently, we grant American Equity a permanent injunction against Malone preventing her from maintaining her suit against American Equity in Kentucky. n1

REVERSED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Parties' requests for oral argument are denied.

Case No. 6:01-cv-1236-Orl-19DAB

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

CHARLES W. STRUBE, individually and as Trustee of the Charles W. Strube Revocable Trust, on behalf of himself and all others similarly situated,
Plaintiff,

-vs-

AMERICAN EQUITY INVESTMENT LIFE INSURANCE CO.,
Defendant.

February 8, 2005, Decided

JUDGES: PATRICIA C. FAWSETT, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINIONBY: PATRICIA C. FAWSETT

OPINION:

ORDER

This case comes before the Court on the following:

1. Parties' Stipulation of Settlement (Doc. No. 188, filed Apr. 8, 2004); Parties' Amended Stipulation of Settlement (Doc. No. 233, Ex. 1, filed Sept. 2, 2004); Parties' Statement Regarding Valuation of the

Proposed Class Settlement (Doc. No. 235, filed Sept. 2, 2004).

2. Beverly Malone's Objection to Proposed Class Action Settlement (Doc. No. 212, filed July 26, 2004); Beverly Malone's Supplemental Response to Proposed Revisions to Class Settlement (Doc. No. 240, filed Sept. 10, 2004).

3. Notice of Filing Objections of Robert Kerney and Maria Burns to Proposed Class Settlement (Doc. No. 225, filed Aug. 20, 2004).

4. Defendant's Reply Memorandum in Support of Class Settlement Approval (Doc. No. 218, filed Aug. 16, 2004); Plaintiffs' Response to Objections to Proposed Class Settlement (Doc. No. 222, filed Aug. 16, 2004).

Procedural Background

Plaintiff Charles Strube initiated this class action lawsuit against Defendant on September 28, 2001, in Florida state court. (Doc. No. 4, filed Oct. 22, 2001). Defendant removed the case to this Court based on its diversity jurisdiction pursuant to 42 U.S.C. § 1332. (Doc. No. 1, filed Oct. 22, 2001). Without opposition and upon leave of Court, Plaintiff filed the First Amended Class Action Complaint adding Wilbert Norris and two other individuals as plaintiffs (Doc. No. 46, filed Feb. 20, 2002), as to which Defendant then filed a motion to dismiss. (Doc. No. 50, filed Mar. 25, 2002). Plaintiffs filed a Second Amended Complaint, again without opposition

from Defendant (Doc. No. 78, filed May 23, 2002), but the Court dismissed such complaint without prejudice upon Defendant's subsequent motion. (Doc. No. 145, filed Feb. 18, 2003). On February 20, 2003, the Court denied Plaintiffs' motion for class certification without prejudice to reassert the motion at a later time. (Doc. No. 150, filed Feb. 20, 2003).

Plaintiffs Strube and Norris filed a Third Amended Class Action Complaint seeking damages and other relief based on Defendant's alleged fraudulent misrepresentation/omission, negligent misrepresentation, and negligence. (Doc. No. 155, filed April 7, 2003). The Court denied Defendant's motion to dismiss the complaint (Doc. No. 171, filed Aug. 1, 2003), and Defendant then filed its Answer and Affirmative Defenses. (Doc. No. 173, filed Sept. 16, 2003). On December 2, 2003, the Court granted the parties' joint motion for a stay of proceedings in light of ongoing settlement negotiations, and such stay was then extended until March 31, 2004. (Doc. No. 179, filed Dec. 3, 2003; Doc. No. 182, filed Feb. 3, 2004; Doc. No. 184, filed Mar. 19, 2004).

The parties notified the Court on March 24, 2004, that a settlement had been reached and filed a Stipulation of Settlement for the Court's approval shortly thereafter. (Doc. No. 185, filed Mar. 24, 2004; Doc. No. 188). The Court held an Initial Fairness/Certification Hearing on May 19, 2004 (Doc. No. 197, filed May 19, 2004), after which the Court granted Plaintiffs' motion for preliminary approval of the settlement and preliminary certification of the proposed nationwide class. (Doc. No. 200, filed May 20, 2004). In accordance with the terms of the settlement agreement and the Court's Order granting preliminary

approval, Defendant mailed a Court-approved Class Notice by first-class mail on June 22 and 23, 2004, to the last known addresses of approximately 23,000 reasonably identifiable class members and re-mailed all notices which were returned with a forwarding address by July 14, 2004. (Doc. No. 218, Ex. 2, Carlson Decl.). Furthermore, Defendant published Summary Notice in the national edition of the *Wall Street Journal* on July 1 and July 2, 2004. (*Id.*).

Upon receipt of the Class Notice, thirty-five (35) class members properly excluded themselves from the settlement class (Doc. No. 227, filed Aug. 20, 2004), and class members Beverly Malone, Robert Kerney, and Maria Burns filed timely objections to the proposed settlement. (Doc. No. 212; Doc. No. 225, Ex. 1, 2). The Court held a Final Fairness Hearing on August 23, 2004, at which counsel for Malone presented oral argument in objection to the settlement and class counsel and counsel for Defendant each argued in support of the agreement. Finally, the Court heard from class members Leonard Strickland, Jr., and Dennis Jackson. Subsequent to the hearing, the parties filed an Amended Stipulation of Settlement (Doc. No. 233) which the Court now considers for final approval.

Nature of Allegations in the Third Amended Class Action Complaint

Plaintiffs allege that Defendant engaged in a wrongful scheme to develop, market, advertise, and sell certain annuities called "equity indexed annuities" through a centrally organized strategy, targeting senior citizens as potentially vulnerable buyers. (Doc. No. 155, P 11). The equity indexed annuity is similar to a variable annuity which is sold and registered as a

security in accordance with federal law and can only be marketed and sold through sales personnel who are licensed and registered to sell securities. (*Id.* at P 12(a)). The equity indexed annuity invests only in bonds and in the issuing company's general account, enabling its issuers and agents to market and sell it without registration, regulation or qualification under securities laws. (*Id.*).

The standardized sales process for the equity indexed annuity involves an agent meeting with an elderly prospective purchaser, establishing a relationship of trust and confidence, then giving an incomplete and misleading description about the product. To accomplish this, Defendant does not adequately screen new sales agents or train its agents about the details of the product even though it knows the product is complex. (*Id.* at PP 16, 21). Since the agents are merely conduits of information, they are unable to dispense an appropriate level of information about the product to the customers, so the customers cannot be sufficiently informed about what they are purchasing. (*Id.*).

As an incentive to enlist its network of agents, Defendant offers extremely high commissions which are not disclosed to the prospective purchasers at the time of sale. (*Id.* at P 21). By offering strong financial incentives to maximize sales, Defendant has fostered the use of high pressure and deceptive sales tactics. (*Id.* at P 22). This creates an environment in which the agents are effectively encouraged to "do whatever is necessary to make a sale." (*Id.* at P 16).

As part of the sales process, Defendant requires the agents to use only company-approved materials and

forms, including applications and disclosures that misrepresent and conceal critical information. (*Id.* at PP 19, 23-25). Additionally, while statutes provide for a "free look," usually 30 days, the disclosure form omits any reference to this "free look" right. (*Id.* at P 42). Due to misrepresentations and omissions in Defendant's standardized sales presentation, the disclosure statement and other sales materials, the prospective purchasers are led to believe, among other things:

(a) The purchaser will be able to structure a retirement income flow that he or she can not outlive. In reality, neither the written disclosure statement nor Defendant's standardized sales pitch discloses that annuity purchasers cannot annuitize until a date past his or her life expectancy, making it statistically unlikely that the elderly purchaser will live long enough to receive the promised retirement income flow. (*Id.* at PP 26-28);

(b) The invested funds will be easily accessible, and withdrawals will be virtually without penalty. In reality, however, the annuity purchasers will suffer substantial penalties for withdrawals made within the first 15 years or more of the annuity contract date, making this product particularly inappropriate for elderly purchasers who will be unlikely to outlive the annuity's surrender charge period. (*Id.* at PP 29-31);

(c) There are no "up-front" sales charges. However, excessive, undisclosed commissions paid to the battery of sales agents results in a diminution of the annuity's value and violates the imputed trust and fiduciary responsibility to customers. (*Id.* at PP 32-34);

(d) Customers will realize gains on the entire investment based upon increases in the Standard and

Poor's Index. However, the return rate is applied only to a portion of the investment determined by a complicated formula not easily understood by the targeted purchasers. Moreover, by repeatedly referring to the Standard and Poor's Index and by using phrases such as "easy access to your funds," and "guaranteed" values, Defendant has intentionally crafted its disclosure statement and other sales materials to create the illusion that a customer's money will be earmarked in an individual account and will be invested in a true market index. Actually, all of a purchaser's money is placed in Defendant's general corporate account with part of the money being used to buy "call options" in the bond market and the rest being used to pay for general corporate expenses. This fact and the attendant risks are never disclosed to customers. (*Id.* at PP 35-36);

(e) Customers will benefit from a more favorable tax treatment. While Defendant's sales materials tout tax deferral as the primary selling point, Defendant knew through the application process that many of the investments which Plaintiffs were surrendering in order to buy Defendant's annuities are already tax deferred. Defendant was further aware and failed to disclose that, unlike other retirement investments, distributions from these annuities will be taxed as ordinary income and no stepped-up basis will be allowed upon the death of the annuitant. Notwithstanding, Defendant systematically encouraged its sales agents to recommend to these elderly customers that they need to roll their money into this annuity for its tax advantages. (*Id.* at PP 37-39).

Strube Allegations

In early 1999, Charles Strube, age 73, was called on in his home by Defendant's agent, Michael Lait, who informed him that several of his existing annuities were maturing and that he should surrender those annuities and use the proceeds to purchase Defendant's equity indexed annuities. (*Id.* at P 66). Lait employed Defendant's standardized application, benefit summary, and life insurance replacement forms. (*Id.* at PP 67-68). Strube alleges that the benefit summary misrepresented the fact that substantial surrender charges would be in effect for withdrawals of more than ten percent (10%) of the initial premium for the first fifteen (15) years of the annuity. (*Id.* at PP 69, 73). He further alleges that he was not informed of the significant costs associated with liquidating his existing policies, that the benefits promised by Lait were illusory, that his investment would be diminished by sales charges and excessive agent commissions, and that his premium would not be invested in equity investments. (*Id.* at PP 68, 70, 72).

Strube claims that he relied on the misrepresentations contained in Defendant's written materials in concluding that he would attain liquidity by purchasing Defendant's product. (*Id.* at P 74). Strube completed and signed the forms provided by Lait on March 22, 1999, thereby surrendering his existing annuities, and subsequently applied the proceeds of more than $ 800,000 to the purchase of five equity indexed annuities from Defendant. (*Id.* at PP 76-77).

Norris Allegations

At the age of 68, Wilbert Norris was called on by Defendant's agent Cheryl Ferrari, who informed him that his Individual Retirement Account (IRA) was losing money and that an equity indexed annuity, based

on an equity market index, would provide him with a guaranteed income of five percent (5%) per year. (*Id.* at PP 80-81). Like Strube, Norris alleges that the uniform materials provided by Defendant through Ferrari misrepresented or failed to disclose vital information regarding (1) surrender charges for the first 15 years of the annuity, (2) the promised tax benefits of purchasing Defendant's product, (3) the diminution of his investment due to sales charges and commissions, and (4) the fact that the premium would not be invested in equity investments. (*Id.* at PP 83-84).

Norris allegedly relied on the information he received from Defendant's marketing materials and Ferrari's representations that he would suffer no surrender charges, no risk, no management fees, no local charges, and no commissions in forming the belief that he would have liquidity and income for his lifetime with the equity indexed annuity. (*Id.* at PP 85-86). Norris purchased Defendant's annuity product on September 29, 1999, after cashing in his IRA for $ 35,000. (*Id.* at PP 80, 87). Finally, Norris alleges that he chose not to exercise his "free look" right to rescind the contract upon discovering the 15-year period of the policy, after he was assured by Ferrari that the term was "for the company's benefit," not for him. (*Id.* at P 88).

Terms of the Proposed Settlement

As defined in the Amended Stipulation of Settlement, the proposed class includes all persons or entities who have an ownership interest in one or more Equity Indexed Annuities identified as Index-1, Index P-3, Index-4, Index-5, Index-6, Index-8, Index-10, and Index-12, issued by Defendant between November 1,

1995, and the date of class certification. (Doc. No. 233, § 11(12), (36)). The class does not include any person or entity "(i) who is deceased and the contract death benefit has been paid to the designated beneficiary; (ii) who when surrendering their Policy instructed Defendant to forward the refunded proceeds directly to another company for reinvestment in an insurance or annuity product; (iii) who, while represented by counsel, signed a document that operates to release Defendant from any claims concerning such Policy; (iv) whose Claim respecting such Policy has been finally adjudicated in a court of law; or (v) who has timely excluded himself or herself from the Class...." (*Id.*, § II(12)).

Non-Economic Relief

In response to Plaintiffs' allegations concerning the insufficient training of agents and the methods by which Defendant marketed and sold its annuities, the proposed settlement provides that Defendant shall implement a web-based system of training its agents in compliance with applicable law and industry guidelines and provide financial incentives to encourage agents' participation in such training and continuing education. (*Id.*, § III(A)(1)). Defendant will monitor the point of sale by adopting guidelines and procedures to ensure that its agents disclose information about products and make appropriate recommendations to customers in an understandable manner, and by implementing a system of tracking sales and transactions by which Defendant can detect agent practices that do not comply with industry and legal standards. (*Id.*, § III(A)(2)). Post-sale monitoring will be achieved in part through policies and procedures for properly identifying, evaluating and

handling customer complaints, supervision and review of all sales and marketing practices, continuing training in company policies and industry and legal standards, post-sale customer surveys, and field inspections of agents and agencies. (*Id.*, § III(A)(3)). Furthermore, Defendant will ensure that its marketing materials are informative, truthful, and "tested for comprehension in relation to market demographics." (*Id.*, § III(A)(4)). An Oversight and Compliance Committee, comprised of class counsel and counsel for Defendant or their appointed successors, shall monitor Defendant's implementation of these non-economic relief policies and programs. (*Id.*, § § II(32), III(A)).

General Policy Relief

This type of economic relief provided under the proposed settlement will require no demonstration by the class member of fault or wrongdoing on Defendant's part and is designed to satisfy those class members in need of immediate income. (*Id.*, § III(B)). All class members will receive this general relief unless they expressly choose individual claim relief, discussed *infra*. (*Id.*, § III(B)(1)).

Under general policy relief, class members may "elect to annuitize his or her contract value over a period of at least ten (10) years and life expectancy. Such option may be elected immediately or at any time during the contract term." (*Id.*, § III(B)(1)(a)). In addition, a two percent (2%) annuitization bonus will be added to the value of the policies of those class members choosing enhanced annuitization. "For example, a Policy with a $ 100,000.00 contract value at the time annuitization is elected will be annuitized based upon a value of $ 102,000.00...." (*Id.*, §

III(B)(1)(b)). Finally, class members who have previously surrendered their policies and directly received the refunded proceeds may elect to return such proceeds to Defendant in order to receive an immediate annuitization benefit and the 2% policy enhancement. (*Id.*, § III(B)(1)(c)).

Individual Claim Relief

Any class member who believes that the general policy relief provides insufficient compensation for the actual harm he or she claims to have suffered may elect to forego such general relief and pursue an individual review as to both liability and damages by a Claims Review Panel, composed of three individuals appointed by class counsel and counsel for Defendant. (*Id.*, § § II(10), III(B)(2)(a)).

A class member choosing this option must submit a claim form containing a full description of his or her claim, any and all documents in the individual's possession relating to the subject policy, and a sworn affirmation or declaration as to the veracity of the information and documentation provided. (*Id.*, § III(B)(2)(b)(i)). The Claims Review Panel will review, assess and resolve in writing each individual claim within 180 days of receipt of the completed claim form, and may offer the claimant any appropriate relief. (*Id.*, § III(B)(2)(b)(ii), (B)(2)(c)). The settlement agreement imposes no cap and no restriction on the amount or nature of relief available. Should the panel conclude that individual relief is not warranted by the claim, it may choose to offer such claimant general policy relief. (*Id.*, § III(B)(2)(c)).

Decisions of the Claims Review Panel may be appealed to the Oversight and Compliance Committee,

the decision of which shall be final and binding on both parties. However, disputes between members of the Oversight and Compliance Committee shall be resolved by a mediator and, if mediation is unsuccessful, by the Court. (*Id.*, § III(B)(2)(d)).

Release

In consideration for the economic and non-economic relief afforded by Defendant under the proposed settlement agreement, Plaintiffs and all class members shall release and discharge Defendant and "Defendant's past and present officers, directors, employees, branch managers, Agents (including those acting on an Agent's behalf or at the Agent's direction)..." all claims "that have been, could have been, may be or could be alleged or asserted now or in the future by Plaintiffs or any Class Member...on the basis of, connected with, arising out of, or related to, in whole or in part, the Released Transactions." (*Id.*, § § II(42), VII(A)(1)). The agreement defines "Released Transactions" as "the marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation, performance, retention, administration and/or replacement...of [Equity Annexed Annuities issued by Defendant during the Class Period]." (*Id.*, § II(36), (41)).

Attorney's Fees

The proposed settlement agreement further provides that, in accordance with *Federal Rule of Civil Procedure 23(h)*, class counsel may apply to the Court for an award of attorney's fees not to exceed $ 1,700,000.00, and Defendant shall not oppose such application. (*Id.*, § VIII).

Class Certification

Before certifying a class, the Court must be satisfied that several prerequisites are met: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*. In addition, the proposed class must meet the requirements of one of three class types outlined in *Rule 23(b)*. In the instant case, the parties seek certification under *Rule 23(b)(3)*, which requires the Court to find "that the questions of law or fact common to the members of the class predominate" over individual issues of law or fact, and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." While the proposed settlement is relevant in that the Court "need not inquire whether the case, if tried, would present intractable management problems," the requirements of *Rule 23* must nevertheless be satisfied "to protect absentees by blocking unwarranted or overbroad class definitions." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)*.

In its Order granting preliminary certification, the Court found that the proposed class satisfied the requirements of *Rule 23(a)* and *(b)*. (Doc. No. 200). Of the objections brought before the Court for consideration since that initial ruling, none have taken issue with the propriety of the class as defined in the Amended Stipulation of Settlement.

Numerosity

The Eleventh Circuit has stated that, generally, more than forty (40) putative class members is sufficient to make joinder of all members impracticable. *See Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986).* In the instant case, Defendant has reasonably identified 23,000 class members, and the Court finds that the numerosity requirement of *Rule 23(a)(1)* is easily satisfied.

Commonality

To meet the requirement of *Rule 23(a)(2)* that there be "questions of law or fact common to the class," the Court must find only that "at least one issue exists that affects all or a significant number of proposed class members." *Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741, *11 (M.D. Fla. 1998)* (citation omitted). Commonality may be established where there are allegations of "common conduct or standardized conduct by the defendant directed toward members of the proposed class." *1998 U.S. Dist. LEXIS 1557, [WL] at *12.* Plaintiffs have alleged that Defendant engaged in a nationwide marketing and sales program by which customers were fraudulently or negligently misled as to the benefits of purchasing its equity indexed annuities through the use of standardized forms and uniform sales pitches, and accordingly, the Court finds that the commonality requirement is satisfied.

Typicality

Rule 23(a)(3) requires that "the claims of the class representatives arise from the same broad course of conduct that gives rise to the claims of the other class members...." *1998 U.S. Dist. LEXIS 1557, [WL] at *13.*

Typicality is not defeated by slight factual differences between the representatives and the rest of the class. *Id.* In the instant case, Plaintiffs allege that they fell victim to and suffered damage as a result of Defendant's fraudulent and deceptive marketing and sales campaign, the same scheme that they allege Defendant used against other class members in selling its annuity products. Therefore, Plaintiffs claims are typical of the claims of the class.

Adequacy of Representation

The final condition of *Rule 23(a)* demands that the interests and legal rights of absent class members be protected by ensuring adequate representation on the part of both the class representatives and their counsel. *1998 U.S. Dist. LEXIS 1557, [WL] at *14.* First, the representatives "must appear to be capable of prosecuting the actions through qualified, experienced and competent counsel." *Id.* Since the inception of the instant suit, class counsel have exhibited competence, and the Court is satisfied that they are experienced and well qualified to prosecute this litigation on behalf of the class.

Secondly, the Court must find that there is "no antagonism or disabling conflict between the interests of the named class representatives and the interests of the members of the class." *Id.* Here, as in *Elkins,* Plaintiffs and all other class members "can claim to be harmed by [Defendant's] alleged misconduct and all class members have the mutual incentive to establish the alleged fraudulent scheme." *Id.* Additionally, where adequacy of representation is considered in the settlement context, "so long as all class members are united in asserting a common right, such as achieving

the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *In re Corrugated Container Antitrust Litig., 643 F.2d 195, 208 (5th Cir. 1981).* In the case at bar, all class members have an equal interest in achieving the best possible result in settlement negotiations, and the agreement before the Court "does not discriminate or allocate relief among different segments of the class." *Elkins, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741, *11.* Having found class counsel to be competent and qualified to prosecute the litigation and finding that there is no conflict of interest between Plaintiffs and the rest of the class, the requirement under *Rule 23(a)(4)* is satisfied.

Predominance/Superiority

The predominance requirement of *Rule 23(b)(3)* is "far more demanding" than the commonality question in *Rule 23(a)(2)* in order to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem, 521 U.S. at 623, 624.* The rule provides several factors to be considered by the Court in determining whether common questions of law or fact "predominate over any questions affecting only individual members" and whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy:"

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the

> desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). In *Amchem*, an asbestos products liability action, the Supreme Court held that the predominance requirement was not met where individual class members had been exposed to various products containing asbestos for widely differing amounts of time and in different ways, and where some class members had already experienced debilitating physical injury while others exhibited only early symptoms and still others had not yet developed any signs of injury. *521 U.S. at 624.*

The facts in *Amchem* are distinguishable from the instant action. Plaintiffs allege that all class members were presented with the same standardized marketing materials which deceived, misinformed, and failed to disclose vital information to elderly customers with regard to the sale of the same equity indexed annuities, taking advantage of their age with the knowledge that they were unlikely to survive long enough to reap the benefits of their purchase. The fraudulent course of conduct alleged in the complaint is common to all class members, and individual variations of fact would be insufficient to defeat predominance. *See Elkins, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741, *15* (citation omitted) (finding predominance requirement satisfied where complaint alleged that insurance company engaged in common course of conduct and used standardized materials to fraudulently market life insurance policies).

Class members have exhibited little interest in individually controlling the prosecution of separate actions, only 35 of them having elected to exclude themselves from the class. Only two other suits are currently pending against Defendant related to the sale of annuities. The first action pending is that of Beverly Malone in Kentucky state court, discussed in more detail, *infra.* n1 The other suit was filed in California after this Court entered its Order preliminarily approving class certification and enjoining class members from initiating any action based on or related to the allegations in this case. n2 (Doc. No. 200). Significantly, the plaintiffs in each of those actions seek to certify and represent classes in their own right, a fact which further supports a finding that class action is appropriate in the instant case. Finally, the third and fourth factors listed by *Rule 23(b)(3)* concerning the interest in concentrating the action in a particular forum and the manageability of a class action become "conceptually irrelevant in the context of settlement." *Elkins, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741, *19* ("With the settlement in hand, the desirability of concentrating the litigation in one forum is obvious....") (citing *Amchem, 521 U.S. at 620*).

Having found that the numerosity, commonality, typicality, and adequacy of representation requirements of *Rule 23(a)* have been satisfied, that common questions of fact and law predominate over the individual issues of class members, and that a class action is the superior method of adjudicating this controversy, the Court rules that certification of the class as defined in the Amended Stipulation of Settlement is appropriate.

Fairness/Adequacy of Settlement

Rule 23(e)(1) mandates that any settlement or voluntary dismissal of a class action be subject to the approval of the Court but does not set forth specific standards to be applied in granting such approval. A proposed settlement must be "fair, adequate and reasonable and [must not be] the product of collusion between the parties." *Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984)* (quoting *Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977))*. In *Bennett*, the Eleventh Circuit underscored the "strong judicial policy favoring settlement as well as [] the realization that compromise is the essence of settlement." *Id.* (citing *United States v. City of Miami, 614 F.2d 1322, 1344 (5th Cir. 1980))*. There are several factors for the Court to consider in determining whether to approve the settlement agreement before it:

> (a) The likelihood of success at trial and potential recovery;
> (b) The complexity, expense and duration of litigation;
> (c) The terms of the settlement;
> (d) The procedures afforded to notify the class members of the proposed settlement, and to allow them to present their views;
> (e) The judgment of experienced counsel for the plaintiff class;
> (f) The substance and amount of opposition to the settlement; and
> (g) The stage of the proceedings at which the settlement was achieved.

*Elkins, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741, at *25* (citing *In re Corrugated Container, 643 F.2d at*

212; Warren v. City of Tampa, 693 F.Supp. 1051, 1055 (M.D. Fla. 1988)).

Likelihood of Success at Trial and Potential Recovery

"It is not necessary to try the merits of the case in connection with reviewing the settlement... Thus, the Court can limit its inquiry to determining 'whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement.'" *Elkins, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741 at *25* (quoting *Ressler v. Jacobson, 822 F. Supp. 1551; 1553 (M.D. Fla. 1992)).*

In addition to proving the elements of their claims, Plaintiffs must overcome several affirmative defenses pled by Defendant including: (a) that the annuities in question were state-approved and sold by licensed agents; (b) that the forms provided to customers fully and accurately disclosed all material facts and the contracts provided a 30-day "free look" period; (c) that there was no justifiable reliance on statements made by agents that were contradicted by disclosures contained in written materials; (d) that plaintiffs who failed to read or ignored written materials were contributorily negligent; (e) that there is lack of proximate cause of damages; and (f) that Defendant is not liable for the acts of agents who exceeded their authority. (Doc. No. 173).

The proposed settlement has been valued at a minimum of $ 14.7 million, an estimate which includes only the terms of the General Policy Relief. (Doc. No. 235). To this, any recovery realized by class members through the uncapped Individual Claim Relief process must be added, as well as the incalculable benefits of

the non-economic relief. (*Id.*). As for the maximum potential recovery at trial, Plaintiffs' expert, Dr. David J. Nye, estimates that class members could be awarded up to $ 733.9 million in contract rescission in addition to the return of surrender charges paid by class members, disgorgement of profit and investment income, penalty reimbursement, and damages for emotional distress. (Doc. No. 220, p. 12).

"The fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 542 (S.D. Fla. 1988)* (citing *City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 n.2 (2d Cir. 1974)).* The estimated potential recovery reflects the best case scenario in which Plaintiffs would prevail on each and every one of their claims. However, Defendant continues to vigorously deny any liability for wrongdoing based on the allegations in the Third Amended Class Action Complaint. In reality, Plaintiffs face significant risk in taking this litigation to trial where the outcome is uncertain, a fact which weighs in favor of the Court's approval of the settlement.

Complexity, Expense and Duration of Litigation

"Particularly in class action suits, there is an overriding public interest in favor of settlement [because it] is common knowledge that class action suits have a well deserved reputation as being most complex." *Cotton, 559 F.2d at 1331* (citation omitted). In addition to the complexity of the instant case which would likely involve the testimony of numerous experts and presentation of actuarial data and would incur great additional expense, the possible duration of

continued litigation through trial and the appellate process when compared with the class members' advanced age persuades the Court that approval of the settlement is warranted as "an efficient and economical procedure for aggrieved Class Members to obtain appropriate relief." *Elkins, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741 at *27.*

Adequacy of Notice to Class Members

"All class members who would be bound by a proposed settlement" must receive reasonable notice. *Fed. R. Civ. P. 23(e)(1)(B).* The Court-approved Class Notice explained the terms of the proposed settlement and provided a toll-free telephone number by which any class member could obtain additional information about his or her options under the settlement. (Doc. No. 218, Ex. 2, Carlson Decl., Ex. A). Pursuant to *Rule 23(c)(2)(B),* class members were notified that they were permitted to exclude themselves from the class, and that such election was to be communicated to Defendant by mail postmarked no later than July 24, 2004. (*Id.*). Finally, the Class Notice gave instructions to those class members wishing to remain in the class and also to object to the terms of the proposed settlement agreement, in accordance with *Rule 23(e)(4).* (*Id.*). No one objecting to the settlement has raised any issue with regard to the sufficiency of notice to class members, and the Court finds that the requirements of *Rule 23(c)(2)(B)* and *(e)(1)(B)* have been met.

Terms of the Settlement; Substance and Amount of Opposition to the Settlement

"The settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case." *Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).* In doing so, however, the Court must not forget "that compromise is the essence of a settlement. [It] should not make a proponent of a proposed settlement 'justify each term... against a hypothetical or speculative measure of what concessions might have been gained....'" *Id.* (quoting *Milstein v. Werner, 57 F.R.D. 515, 524--25 (S.D.N.Y. 1972)).* As the Eleventh Circuit has emphasized, "a just result is often no more than an arbitrary point between competing notions of reasonableness." *Bennett, 737 F.2d at 987* (quoting *In re Corrugated Container Antitrust Litig., 659 F.2d 1322, 1325 (5th Cir. 1981)).* The Court will evaluate the terms of the settlement described *supra* in connection with the objections made to those terms.

The most substantive objections to the fairness of the proposed settlement come from Beverly Malone, a class member owner of two Index-5 annuities with her own putative class action pending in a Kentucky state court. n3 Malone makes three objections which address each of the substantive components of the settlement agreement, and the Court will address each one in turn.

1. Scope of Release:

Malone objects to the language of the Release and Waiver provision of the proposed settlement, arguing that it is too broad in that it releases claims which were not alleged in the Third Amended Class Action Complaint and because it releases individuals and entities who acted as Defendant's agents but who were

not parties to the instant litigation and who have not contributed to the settlement.

Briefly, the nature of Malone's allegation in her Kentucky action, filed in 2001 and amended prior to notice of the instant settlement, is as follows. Michael McIntyre, through his companies Advanced Legal Systems (ALS) and Addison Insurance Marketing, conducts a "trust mill" operation by which elderly individuals are convinced to purchase living trusts with promises that probate and administrative costs may thus be avoided, that the trusts cannot be challenged, that they are appropriate for every consumer, that they are prepared by licensed attorneys, and that there are no disadvantages to such trusts. Malone alleges that the trust she purchased for $ 1995.00 was an ill-advised product for a person of her age, 75 years old, and that the individuals marketing the trust were non-lawyers who were unqualified to offer such advice. She further alleges that upon her purchase of the living trust, an agent for Addison delivering documents for her signature then persuaded her to purchase two of Defendant's annuities. Malone claims that McIntyre and his companies were agents of Defendant for the purpose of selling equity indexed annuities and that they used their trust mill operation as a way to market those annuities to the target base of elderly consumers. Malone contends that because Defendant contracted with McIntyre, Addison and ALS for the marketing of its annuity products, Defendant was aware of the questionable trust mill operation and that it was being employed to increase annuity sales.

Malone argues that the release provision in the settlement would operate to shield not only Defendant but McIntyre, Addison and ALS, along with the

individual agents with whom she dealt, from liability on the claims of the class she seeks to represent relating to the improper use of living trusts in marketing annuities. She claims that 93% of Addison's sales of annuities in 1997 were sold to ALS's living trust clients, a fact of which Defendant allegedly was aware. She argues that the Third Amended Class Action Complaint in the instant case does not include allegations directly related to the use of living trusts as a tool for selling annuities, and therefore, the proposed settlement does not contemplate these claims and insufficiently compensates class members in her particular position. Finally Malone argues that the Court's approval of the settlement would permit McIntyre and his associates, previously admonished by the Federal Trade Commission and various forums in several states for his operation of trust mills, n4 to continue such operation without recourse.

Defendant counters, initially, that Malone overstates the strength of her claims against it and points to excerpts from her deposition and other record evidence from the Kentucky action to address the merits of those claims. For the sake of the class, however, the Court is less interested in determining Malone's individual chances of recovery in her own action should it be permitted to continue to trial than with ascertaining exactly what types of claims and which potential defendants would be released by the terms of the settlement and the propriety of such release.

The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement.

See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 326 (3d Cir. 1998); *TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982)*; *In re Corrugated Container Antitrust Litig., 643 F.2d 195, 221-22 (5th Cir. 1981)*; *In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 512 (E.D.N.Y. 2003)*; *Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F. Supp. 2d 561, 577 (E.D. Pa. 2001)*. Malone relies on *Schwartz* to support her argument that the release provision at bar is inappropriately broad. However, the facts of that case are distinguishable. In *Schwartz*, the plaintiff alleged that the bundling of professional football games for distribution specifically via satellite television violated antitrust laws. The court held that a settlement release provision barring any future claims of bundling as to satellite, cable and internet broadcasts was too broad because issues relating to cable and Internet bundling did not arise from the same set of facts. *157 F. Supp. 2d at 577*. In addition, the court based its disapproval of the release in question on the fact that it would have barred "later claims based on future conduct." *Id. at 578*. There is no such concern in the present case.

On the other hand, the Third Circuit affirmed approval of a waiver of claims in a case more analogous to the instant action. In *Prudential*, the complaint against the national provider of life insurance policies alleged a "common course of deceptive conduct" regarding the marketing and sales of its products. *148 F.3d at 325*. "The crux of the plaintiffs' complaint was that Prudential engaged in a common scheme of deceptive sales practices. Although the [complaint] specifically lists three types of deceptive sales claims...other allegations address conduct which

supports the common scheme theory and which does not fall neatly within the three enumerated categories." *Id. at 326.* Furthermore, although not addressed directly by the appellate court, the release provision which was upheld in *Prudential* contained language which protected not only the company but its agents as well, regardless of their individual contributions to the settlement. *See In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 559 (D.N.J. 1997).* The district court reasoned that "[a] settlement with Prudential alone would lack finality because if dissatisfied policyholders sued Prudential agents, the agents would likely turn to Prudential for indemnity or contribution." *Id.* Such a result would defeat the purpose of settlement by allowing the "relitigation of settled questions at the core of a class action." *Prudential, 148 F.3d at 326 n.82* (citation omitted).

Likewise, the alleged conduct at the heart of the complaint in the instant case consists of a nationwide, company-wide scheme of preying on elderly customers through inadequately trained agents who deceptively induced them to purchase equity indexed annuities. Defendant has represented that the release would serve to bar only those claims relating directly to the marketing and sale of such annuities. Although some of the defendants in Malone's Kentucky suit are included in the release insofar as they are agents of Defendant for the purpose of selling those products, nothing in the settlement agreement should be interpreted to preclude any claim made by Malone or another class member similarly situated with regard to the marketing, preparation or sale of living trusts. Accordingly, the Court finds that the release and

waiver provision contained in the proposed settlement is appropriate.

2. Economic Relief:

Malone further objects to the proposed settlement on the grounds that the General Policy relief of immediate annuitization plus 2% enhancement of value has an adverse consequence on holders of Index-5 annuities n5 and that there are inadequate guidelines for those class members who elect to seek Individual Claim Relief.

Malone's objection to the General Policy Relief is based on the existence in Index-5 annuity contracts of a 5% bonus for annuitizing after the tenth year of the contract, and increasing bonuses every year thereafter. She proffers the report of her expert, Dr. Adrian Cowan, who contends that holders of Index-5 policies, approximately 30% of the class, n6 would be better advised to forego the general relief of immediate annuitization plus 2% and wait until the end of their contract periods in order to avail themselves of the 5% (or greater) bonus. (Doc. No. 213, Ex. 17, Cowan Report).

Defendant and Plaintiffs counter that this analysis overlooks the benefit of liquidity that immediate annuitization offers to aging class members, a need which they argue is one of the driving forces behind this class action suit. Plaintiffs turn to the report of their own expert, Dr. Nye, which emphasizes that

> "many class members [who were sold an inappropriate product] have a need for immediate income rather than a need to

> build contract value... The appropriate analysis is to compare what was available to class members under the original contract with what is available under the Stipulation... The Stipulation offers annuitization prior to contract maturity without any surrender penalties and adds a 2 percent bonus to the contract value that is annuitized. This can produce a very significant increase in monthly income to the policy owner – especially in the early contract years where surrender charges [under the contract] are as high as 20 percent."

(Doc. No. 220, Nye Report, p. 8). Furthermore, Nye states that holders of Index-5 annuities who choose not to take advantage of the offered general relief but rather to wait until their contracts mature are not harmed by the terms of the Stipulation. (*Id.* at 9). The Court finds this argument persuasive.

Time is of the essence in this case as most class members are of advanced age and purchased Defendant's annuities on the belief that the policies would provide a steady source of income in their declining years. The concept of the time value of money was never more applicable. Although Cowan suggests that more generous terms might have been advantageous to class members, such as the refund of previously charged surrender fees or compensation for the lost opportunity of investing in higher-return investments (Doc. No. 213, Ex. 17, Cowan Report, pp. 12-15), "inherent in compromise is a yielding of

absolutes and an abandoning of highest hopes." *Cotton, 559 F.2d at 1330* (quoting *Milstein, 57 F.R.D. at 525*).

The substance of Robert Kerney's objection to the proposal appears to be that it would not permit him to receive the benefit of the 2% policy value enhancement while taking a lump sum distribution from his policy without paying surrender charges, rather than annuitizing immediately. (Doc. No. 225, Ex. 1). He contends that "for those who do not annuitize, there is no relief." (*Id.*). As Defendant points out, Kerney ignores the possibility of Individual Claim Relief, discussed *infra*, as well as other types of withdrawals permitted under the existing contract. (Doc. No. 218, p. 29, n.23). Similarly, Maria Burns objects to the settlement solely on the ground that the additional option of transferring existing annuities from Defendant to other companies, free from all surrender charges, should be offered to class members. (Doc. No. 225, Ex. 2).

As stated *supra*, the Court need not consider each and every concession that might have been gained. *See Cotton, 559 F.2d at 1330.* The Court finds that the settlement's General Policy Relief fairly addresses the injuries allegedly suffered by class members despite the absence of these alternatives. However, Malone's point that owners of Index-5 annuities might not fully understand that annuitizing immediately with the 2% value enhancement is effectively a forfeiture of the later 5% bonus provided for in their policies is well taken. Accordingly, Defendant is instructed to include a specific explanation of this information in the required Post-Settlement Notice to class members as required by the Amended Stipulation of Settlement.

With regard to Individual Claim Relief, Malone objects that the proposed settlement gives no guidance to potential claimants as to what types of claims are likely to prevail, does not specify the nature or amount of individual relief that might be awarded or whether punitive damages or attorney's fees are available, and provides no evaluative or scoring criteria on which the Claims Review Panel must base its decisions.

Malone cites little or no authority to support her contention that the Individual Claims Process is insufficient to address the needs of those class members who feel that their individual damages exceed that which the General Policy Relief affords. n7 Plaintiffs and Defendant respond by pointing out that the nature of the possible recovery and scoring criteria are not specified because the intent of the settlement is to provide "any appropriate relief" in light of the highly individual facts involved in a given claim. Additionally, they argue that there is no cap on the amount of individual relief to be awarded, thereby allowing the panel the opportunity to fairly assess the damages suffered and to compensate each claimant accordingly. Finally, the parties argue that punitive damages and attorney's fees are extraordinary types of relief available only in the most extraordinary of circumstances, and that such awards are not required in order to render the settlement fair. *See Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 18 L. Ed. 2d 475, 87 S. Ct. 1404 (1967)* (absent a statutory or contractual right, attorney's fees not ordinarily recoverable); *Cohen v. Office Depot, Inc., 204 F.3d 1069, 1075 (11th Cir. 2000)* (quoting *Cohen v. Office Depot, Inc., 184 F.3d 1292, 1295 (11th Cir. 1999)*) (punitive damages available "only where the egregious

wrongdoing of the defendant...constitutes a public wrong"). Given the right of appeal from the panel's decision to the Oversight and Compliance Committee and the availability of mediation and judicial review in the event of a dispute, the Court finds that the Individual Claim Relief afforded in the proposed settlement is fair, adequate and reasonable.

3. Non-Economic Relief:

The last of Malone's objections takes issue with the non-economic relief described in the Stipulation of Settlement relating to the training of agents and point-of-sale and post-sale monitoring of sales practices, described *supra*, arguing that this relief is vague and impossible to evaluate. However, each of the terms enumerated in the proposed settlement concerning this non-economic relief is designed to address specific allegations in the complaint that Defendant engaged in deceptive marketing and sales and failed to adequately train its agents, and they are adequate concessions on the part of Defendant in reaching the agreement.

In contrast to the objections raised by Malone and, to a lesser extent, Kerney and Burns, the vast majority of class members have responded positively to the proposed settlement. Out of a class of approximately 23,000 individuals, only thirty-five (0.15 percent) excluded themselves from the class and only three filed objections. This overwhelming support of class members thus weighs heavily in favor of the Court's approval of the settlement. *See Elkins, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741 at *28.*

Judgment of Experienced Counsel or the Plaintiff Class

The Court, "absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Cotton, 559 F.2d at 1330.* Class counsel in the instant case are capable attorneys with experience in litigation of this nature. (Doc. No. 221, Hargrove Decl., Ex. A). In addition, there is no evidence of any kind that the parties or their counsel have colluded or otherwise acted in bad faith in arriving at the terms of the proposed settlement. Therefore, counsel's informed recommendation of the agreement is persuasive that approval is appropriate.

Stage of Proceedings at which Settlement was Achieved

Finally, the proposed settlement agreement was reached two and a half years after the filing of the original complaint in state court. The parties zealously litigated the case, filed numerous motions, amended pleadings and conducted extensive discovery, all of which activity allowed them the opportunity to consider the relevant facts and applicable legal principles in assessing the strengths and weaknesses of their respective positions. This factor similarly persuades the Court to approve the settlement.

Conclusion

1. The Amended Stipulation of Settlement (Doc. No. 233) is **APPROVED.** A class as defined in the Amended Stipulation of Settlement is hereby certified, and the Third Amended Class Action Complaint (Doc. No. 155) is **DISMISSED** with prejudice. The Court will retain jurisdiction to enforce the terms of the settlement agreement.

2. The Court reserves ruling on the issue of attorney's fees.

3. Defendant's Motion for Leave to File Reply to Malone's Post-Hearing Filings (Doc. No. 246, filed Oct. 4, 2004) is **DENIED** as moot.

DONE and **ORDERED** in Chambers in Orlando, Florida this 8th day of February, 2005.

PATRICIA C. FAWSETT, CHIEF JUDGE

UNITED STATES DISTRICT COURT

Footnotes

n1 *Malone v. Addison Ins. Mktg., Inc.*, Civil Action No. 01-CI-02109, Division 1, Jefferson Circuit Court, Kentucky. (Doc. No. 223).

n2 *Calif. Advocates for Nursing Home Reform v. American Equity Investment Life Ins. Co.*, No. CGC-04-435933, Superior Court, County of San Francisco. (Doc. No. 249, filed Jan. 26, 2005).

n3 *Malone v. Addison Ins. Mktg., Inc.*, Civil Action No. 01-CI-02109, Division 1, Jefferson Circuit Court, Kentucky. (Doc. No. 223).

n4 These states include New Jersey, Ohio, Pennsylvania, Kansas, and Oregon. (Doc. No. 213, Ex. 8-15).

n5 In her first brief, Malone also argued that the immediate annuitization "over a period of at least ten (10) years and life expectancy" provided insufficient relief, based on her expert's misinterpretation of that term to mean ten years *plus* life expectancy. (Doc. No. 213, Ex. 17, Cowan Report). The parties clarified at the

Final Fairness Hearing that the term is to be understood to mean the greater of ten years *or* life expectancy (Doc. No. 232, p. 42), and Malone does not renew this objection in her supplemental brief filed after the hearing.

n6 Actually, Cowan's report incorrectly assumes that all of the annuities which are the subject of the settlement include a 5% bonus at the end of the contract period, and she opines that every class member will thus be faced with such a dilemma. (Doc. No. 213, Ex. 17, Cowan Report). In fact, only the Index-5 policies provide such a bonus. (Doc. No. 218, Ex. A, Wingert Decl.).

n7 Although Malone cites the district court's decision in *Prudential* to illustrate a settlement in which objective criteria were delineated and a scoring system was employed for individual claim review, that case involved a class of approximately eight million class members and settlement terms which the court itself described as "exceptional." *962 F. Supp. at 510, 535.* The opinion does not hold that such provisions are prerequisites to a fair and adequate settlement.

Filed 4/6/06
No. 05-11461 Non-Argument Calendar, No. 05-13014
Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES W. STRUBE, individually, and as Trustee of the Charles W. Strube Revocable Trust, on behalf of himself and all others similarly situated, WILBERT NORRIS, individually and on behalf of himself and all others similarly situated, et al.,
Plaintiffs-Appellees,

BEVERLY MALONE,
Plaintiff-Appellant,

versus

AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY, an Iowa corporation,
Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

Before ANDERSON, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure),

the Petition(s) for Rehearing En Banc are denied.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

Section 2 of Public Law No. 109-2
[The Class Action Fairness Act ("CAFA")]:

FINDINGS AND PURPOSES.

(a) FINDINGS.----Congress finds the following:
(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
(2) Over the past decade, there have been abuses of the class action device that have----
(A)harmed class members with legitimate claims and defendants that have acted responsibly;
(B) adversely affected interstate commerce; and
(C) undermined public respect for our judicial system.
(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where----
(A) *Counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value*;
(B) *unjustified awards are made to certain plaintiffs at the expense of other class plaintiffs*; and
(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.
(4) Abuses in class actions undermine the national

judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are----

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of state defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.----The purposes of this Act are to----

(1) *assure fair and prompt recoveries for class members with legitimate claims*;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

(emphasis supplied)

Fed. R. Civ. P. 23(e):

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class;

.....

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate;

(2) The parties seeking approval of a settlement,

voluntary dismissal, or compromise, under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it afford a *new* opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

4(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A)....

(emphasis supplied)

Fed. R. Civ. P. 23(f):

Appeals. A court of appeals may in its discretion permit the appeal rom an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Advisory Committee Notes to the 2003 Amendments to Rule 23(e)(3):

Once an objector appeals, control of the proceedings lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and

settlement.